SUPREME

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1032

CLYDE E. SKEEN,

Petitioner,

v.

VALLEY BANK OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

HENRY D. AKIN, JR.,
One Metro Square, Suite 170,
2655 Villa Creek Drive,
Dallas, Texas 75234,
Telephone: (214) 243-5421,
Counsel for Petitioner.

GARY D. BERGER,
1019 Mills Building,
220 Montgomery Street,
San Francisco, California 94104,
Telephone: (415) 421-5101,
Of Counsel.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

Subject Index

	Page
Opinion below	1
Jurisdiction	1
Federal question presented	1
The constitutional provisions involved	2
Statement of the case	3
Reasons for granting petition	4
Conclusion	8

Table of Authorities

Cases	Pages
Galpin v. Page, 18 Wall. 350 (1873)	5
Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909)	4, 5, 6
Hovey v. Elliott, 167 U.S. 409 (1897)	4, 5
Societe Internationale v. Rogers, 357 U.S. 197 (1958)	4, 7
Windsor v. McVeigh, 93 U.S. 274 (1876)	5

Statutes and Rules	
28 U.S.C. Sec. 1257(3)	2
Federal Rule of Civil Procedure 37	6
Nevada Rule of Civil Procedure 37	7

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

CLYDE E. SKEEN,

Petitioner,

v.

VALLEY BANK OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner, Clyde E. Skeen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada, entered in the proceeding on July 9, 1973.

OPINION BELOW

The opinion of the Nevada Supreme Court, the trial court judgment which it affirmed and the order denying rehearing appear in Appendices A, B and C, respectively.

JURISDICTION

The judgment of the Supreme Court of the State of Nevada

was entered on July 9, 1973. A petition for rehearing before said court, timely filed, was denied on September 17, 1973, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

FEDERAL QUESTION PRESENTED

The Nevada Rules of Civil Procedure were amended in 1971 to delete the necessity of willfulness from the requirements for imposing a default judgment as against defendants who fail to comply with discovery procedures. Petitioner, after being served in a proceeding in the Second Judicial District Court of the State of Nevada, failed to appear at depositions in the matter after being noticed to appear. There was no showing at all in the proceedings in Nevada as to whether or not petitioner's failure to appear was willful. Petitioner now claims that said failure was not willful. As a result of the failure to appear, the Nevada court ordered the striking of petitioner's answer in the case and entered a substantial default judgment against him. The question thus arising is whether a default judgment may be entered against a party for his failure to comply with discovery rules where there is no showing that his failure was willful. This question is of substantial importance and impact beyond an interpretation of the constitutionality of the Nevada law because the Federal Rules of Civil Procedure are substantially identical to the Nevada law on the point in issue.

THE CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process

clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On September 8, 1971, the petitioner guaranteed to the respondent bank a promissory note of $400,000 made by Reno Race Park, Inc. The note, which became due on December 8, 1971, carried an interest rate of 9% and provided for reasonable attorneys' fees in the event of default or suit thereon. Default occurred, with neither interest nor principal having been paid.

On January 4, 1972, the respondent filed a complaint against the petitioner, but not the maker of the note, to recover on the promisssory note that had been guaranteed by him. The petitioner's answer was filed on January 28, 1972. The respondent then submitted a request for admissions which were in turn answered. On March 17, 1972, the respondent filed a notice to take the petitioner's deposition on April 3, 1972. The parties, through their attorneys, stipulated that the time for taking the deposition would be continued until April 17, 1972. The petitioner did not appear on that date. No court order was issued for him to appear at this or any other deposition. There was no showing in this matter as to the willfulness or lack of willfulness on the part of petitioner for the failure to appear at the deposition. The petitioner contends that his failure was not willful.

Upon motion by the respondent, the Nevada District Court struck petitioner's answer, entered a default and awarded

judgment for the full amount of the note, plus interest and attorneys' fees, to the respondent. The petitioner appealed the action to the Nevada Supreme Court contending that the action of the trial court was an unduly harsh sanction and constituted an abuse of discretion. The Nevada Supreme Court, raising the due process issue on its own motion, rejected petitioner's appeal and affirmed the judgment of the trial court. The petitioner raised the due process issue for the first time on his petition for rehearing before the Nevada Supreme Court and that petition was rejected without comment as to the merits of the due process issue.

REASONS FOR GRANTING PETITION

The Nevada Supreme Court, in its decision after its original hearing in this matter, cited the trilogy of cases that this Court has handed down which frame the issue of when the denial of a hearing on the merits is repugnant to the due process clause of the Constitution: *Hovey v. Elliott*, 167 U.S. 409 (1897); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); and *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

The first case cited, *Hovey*, makes it clear that the courts may not impose a default as a punishment for failure to perform a required act. This Court held, and that holding remains intact today, that such action contravenes the fundamental right guaranteed by the Constitution to a decision on the merits prior to any taking of property. The Court cited in that case a string of American and English decisions spanning centuries establishing this basic right as a fundamental part of the due process

clause. In quoting *Windsor v. McVeigh*, 93 U.S. 274 (1876), at 277, the Court in *Hovey* (at p. 414) set forth the Constitutional principle:

> "Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a common principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

This Court went on (at p. 418) to further quote *Galpin v. Page*, 18 Wall. 350 (1873), at 368:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and he has been afforded an opportunity to be heard*. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

The next case in the trilogy, *Hammond*, refined the principles laid out in *Hovey*, but in no way overruled any part of it. *Hammond* stands for the principle that the legislature may properly set forth rules whereby courts may grant a default for failure to perform a required act where the circumstances permit a logical inference or presumption that the non-response was an admission of lack of merit. The Court stated in *Hammond* (at p. 351) that:

> "The difference between mere punishment as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as fol-

> lows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."

This Court went on to say in *Hammond* (at p. 352) that:

> "[F] or a failure to give or produce such evidence, the law might authorize a presumption *in a proper case* against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed." (Emphasis added)

The key point in reading *Hovey* and *Hammond* together is that a default is constitutionally permissible only when a failure to act occurs under facts and circumstances sufficient to give rise to a presumption that such failure indicates lack of merit; *i.e.*, a presumption that goes directly to a fair determination of the merits, which is what the due process clause is designed to protect. Conversely, if the facts and circumstances of the failure do not give rise to a reasonable presumption as to the merits, the rendering of a default would be a mere punishment without a fair determination of the merits of the case at hand and prohibited by the *Hovey* case.

The third case in the trilogy, *Rogers*, consists of an interpretation of Rule 37 of the Federal Rules of Civil Procedure, as it existed in 1958. Then, as now, Rule 37 was the federal rule promulgated in accordance with *Hammond* which set forth the various sanctions, including default, which federal courts could impose for failure to comply with the discovery rules. The Court was asked to decide in *Rogers* whether *any sanctions at all* could

be imposed for a *non-willful* failure to comply with discovery rules. In reply, the Court stated (at p. 208) that:

> "For purposes of a subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

In the *Rogers* case the Court, in discussing and expressly approving *Hovey* and *Hammond*, recognized the vast difference between ordinary sanctions and the imposition of a default, which goes to the very heart of due process, when it stated (at p. 209) that:

> "These decisions *(Hovey* and *Hammond)* establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

In the *Rogers* case this Court held the framework of *Hovey* and *Hammond* together by ultimately ruling in the case that although the legislature and the courts could impose some sanctions for a non-willful failure to comply with discovery rules, in the case at hand the failure was non-willful and therefore could not support a presumption of lack of merit.

As the Nevada Supreme Court stated in its opinion on its original hearing of this matter, NRCP 37(d) was amended effective September 27, 1971 to reflect the amendment to Rule

37(d) of the Federal Rules of Civil Procedure, which was effective July 1, 1970, by deleting a requirement, in an attempt to conform to *Rogers,* that a failure to comply with discovery rules be willful prior to the imposition of sanctions.

The petitioner contends that here lies the constitutional error of the Nevada legislature: It removed the requirement of willfulness as against *all* sanctions, including the granting of a default. The amendment completely failed to recognize the fundamental difference in kind — rather than degree — of the sanction of default, which goes to the very heart of the concept of due process and the right to a fair determination on the merits. As *Rogers* made abundantly clear, without the necessary initial fact premise of willfulness, the presumption of lack of merit will not stand. A non-willful failure will not bear an inference as to the merits of the underlying claim. *Hovey, Hammond* and *Rogers,* which must be read together, are in complete harmony on this. The 1971 amendment allowed the Nevada courts to erroneously enter a default judgment against the petitioner for almost a half million dollars without a finding as to willfulness, and thus, without a fair determination as to the merits of the case. The petitioner contends that his fundamental constitutional rights were thus violated by the procedure authorized by NRCP 37(d), and any judgment rendered in reliance thereon is void.

CONCLUSION

For these reasons, a writ of certiorari should issue to review

the decision of the Supreme Court of the State of Nevada.

Respectfully submitted,

HENRY D. AKIN, JR.,
Counsel for Petitioner.

GARY D. BERGER,
Of Counsel.

Dated, December 6, 1973.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Petition for Writ of Certiorari to the Supreme Court of the State of Nevada have been served upon each party in accordance with the provisions of the Revised Rules of the Supreme Court of the United States, by depositing such copies in the United States post office, airmail postage prepaid, this 12th day of December, 1973, addressed to counsel of record for each party at the post office of each such counsel, as follows:

Leo P. Bergin, III,
Gary A. Wood,
McDonald, Carano, Wilson & Bergin,
60 Court Street,
Reno, Nevada 89505,

Attorneys for Valley Bank of Nevada, Respondent.

Henry D. Akin, Jr.
Counsel for Clyde E. Skeen,
Petitioner.

APPENDIX

89 Nev., Advance Opinion 105

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE E. SKEEN,

Appellant,

v.

VALLEY BANK OF NEVADA,

Respondent.

No. 6988

July 9, 1973

Appeal from an order striking the appellant's answer, entering default and awarding judgment. Second Judicial District Court, Washoe County; John W. Barrett, Judge.

Affirmed.

A. D. Demetras, of Reno, for Appellant.

McDonald, Carano, Wilson & Bergin and *Gary A. Wood*, of Reno, for Respondent.

OPINION

By the Court, BATJER, J.:

On September 8, 1971, the appellant guaranteed to the respondent bank a promissory note of $400,000.00 made by Reno Race Park, Inc. The note, which became due on December 8, 1971, carried an interest rate of nine percent (9%) and provided for reasonable attorneys' fees in the event of default or suit thereon. Default occurred, with neither interest nor principal having been paid.

On January 4, 1972, the respondent filed a complaint against the appellant to recover on the promissory note that had been guaranteed by him. The appellant's answer was filed on January 28, 1972. The respondent then submitted a request for admissions which were in turn answered. On March 17, 1972, the respondent filed a notice to take the appellant's deposition on April 3, 1972. The parties stipulated that the time for taking the deposition would be continued until April 17, 1972. The appellant did not appear on that date, nor was any excuse given for his absence. His attorney, who appeared at the designated time and place for the taking of the deposition, expressed surprise at the non-appearance of his client and indicated that he had received no communication from the appellant which would explain his absence. The reporter commissioned to take the deposition, issued a certification of non-appearance against the appellant.

Upon motion by the respondent, the trial court struck appellant's answer, entered its default and awarded judgment for the full amount of the note, plus interest and attorney fees, to the respondent. The appellant contends that the action of the trial court was an unduly harsh sanction and constituted an abuse of discretion. He also seems to contend that a violation of due process occurred.[1]

The sanctions imposed in this case, are explicitly authorized under NRCP 37(d) and NRCP 37(b)(2)(c). NRCP 37(d) was amended effective September 27, 1971, to delete the require-

[1] In Hovey v. Elliott, 167 U.S. 409 (1897), it was held that punishment of a defendant contemner by depriving him of a hearing on the merits is violative of the due process requirements of the Federal Constitution, but this holding was limited by Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), "by holding that a court could properly strike an answer and enter default judgment under circumstances where a party fails to produce documents as ordered." Norman v. Young, 422 F.2d 470 (10th Cir. 1970). See also, Anno., 14 A.L.R. 2d at 593.

ment that the failure to appear was "willful." NRCP 37(d) as presently worded reflects the amendment to the Federal Rules of Civil Procedure, effective July 1, 1970.

Since the amendment of NRCP 37, sanctions are permissible without consideration of whether the unexcused failure to make discovery was willful.[2]

The imposition by the trial court of these sanctions is not unique and does not amount to an abuse of discretion. Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D.Mo. 1971); Marriot Homes, Inc. v. Hanson, 50 F.R.D. 396, (W.D.Mo. 1970); Schatz v. Devitte, 75 Nev. 124, 335 P.2d 783 (1959). See 4A Moore's Federal Practice § 37.05. Cf. Kahn v. Secretary of Health, Education, and Welfare, 53 F.R.D. 241 (D.Mass. 1971), and Conrad v. Sadur, 83 Nev. 39, 422 P.2d 236 (1967).

Default judgments will be upheld where the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights. H. F. Livermore Corp. v. Aktiengesellschaft Gebruder L., 432 F.2d 689 (D.C.Cir. 1970).

Here the promissory note provided for reasonable attorney fees upon default or suit. NRCP 37 also permits an award of attorney fees. Upon the authority of Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 455 P.2d 31 (1969), and Campanelli

[2] In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the High Court held that a default judgment is a proper sanction if the failure to make discovery is due "to willfulness, bad faith or any fault" and not "due to inability," and concluded that willfulness was relevant only to the selection of sanction, if any, to be imposed. The new provisions of Fed. R. Civ. P. 37 were promulgated to bring the rule into harmony with the holding in *Rogers*. See also, Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970).

v. Altamira, 86 Nev. 838, 477 P.2d 870 (1970), we affirm the district court's award of attorney fees.

The order and judgment of the district court is affirmed.

THOMPSON, C.J., and MOWBRAY, GUNDERSON, and ZENOFF, JJ., concur.

NOTE — These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

This opinion is subject to formal revision before publication in the preliminary print of the Pacific Reports. Readers are requested to notify the Clerk, Supreme Court of Nevada, Carson City, Nevada 89701, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

C. R. DAVENPORT, *Clerk.*

No. 274948

DEPT. NO. 2

In The

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

VALLEY BANK OF NEVADA,
a Nevada banking institution,

Plaintiff,

v.

CLYDE E. SKEEN,

Defendant.

ORDER STRIKING DEFENDANT'S ANSWER ENTERING DEFENDANT'S DEFAULT AND JUDGMENT

Pursuant to the Motion to Strike Defendant's Answer and the Affidavit of Leo P. Bergin, and all records and files in this action, and good cause appearing therefor,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That Defendant's Answer be stricken based upon the motion of Plaintiff for Defendant's failure to appear at depositions after being duly noticed for said depositions.

2. That Defendant's default be entered and judgment be

awarded against Defendant and in favor of Plaintiff, in the following amounts:

a. $400,000.00 to pay Plaintiff for moneys owing from Defendant as guarantor on a Promissory Note made by Reno Race Park, Inc.

b. Interest to May 15, 1972 in the amount of $30,233.33, plus interest from and after May 15, 1972, at the rate of 12% per annum until paid.

c. Costs in the amount of $75.00.

d. Plaintiff's attorneys' fees in the amount of $40,000.00.

DATED this 16th day of May, 1972.

/s/ JOHN W. BARRETT

District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 6988

CLYDE E. SKEEN,

Appellant,

v.

VALLEY BANK OF NEVADA,

Respondent.

ORDER DENYING REHEARING

Rehearing denied: remittitur shall issue forthwith. It is so ORDERED.

/s/ THOMPSON, C. J.
Thompson

/s/ MOWBRAY, J.
Mowbray

/s/ GUNDERSON, J.
Gunderson

/s/ BATJER, J.
Batjer

/s/ ZENOFF, J.
Zenoff

cc: *Counsel of Record*
Honorable H. K. Brown, Clerk